

ESTTA Tracking number: **ESTTA577099**

Filing date: **12/17/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91213097
Party	Plaintiff Luxco, Inc.
Correspondence Address	MICHAEL R ANNIS HUSCH BLACKWELL LLP 190 CARONDELET PLAZA, SUITE 600 ST. LOUIS, MO 63105 UNITED STATES mike.annis@huschblackwell.com, alan.nemes@huschblackwell.com, andy.gilfoil@huschblackwell.com
Submission	Opposition/Response to Motion
Filer's Name	Andrew R. Gilfoil
Filer's e-mail	andy.gilfoil@huschblackwell.com
Signature	/s/ Andrew R. Gilfoil
Date	12/17/2013
Attachments	response.PDF(989160 bytes)

CERTIFICATE OF MAILING VIA ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals on December 17, 2013.

/s/ Andrew Gilfoil

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Mark: GENERACION REBELDE
U.S. Application Serial No. 77/752,453

LUXCO, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91213097
)	
JOSE ADRIAN CORONA)	
RADILLO,)	U.S. App. No. 77/752,453
)	
Applicant.)	

**LUXCO'S RESPONSE TO APPLICANT'S REQUEST FOR TELEPHONIC
SETTLEMENT/DISCOVERY CONFERENCE**

Opposer Luxco, Inc. ("Luxco"), by and through its undersigned attorneys and pursuant to 37 C.F.R. §2.127(a), files its response to Applicant's Request for Board Participation in a Telephonic Settlement/Discovery Conference filed in this matter on or about December 13, 2013 [Dkt. 5], as follows:

1. Pursuant to the Board's October 21, 2013 Notice and Trial Dates Scheduling Order, the parties were directed to undertake an discovery conference on or before December 30, 2013. *See* Order [Dkt. 2], at p. 2.
2. Applicant filed its answer in the above-referenced matter on November 26, 2013. *See* Answer [Dkt. 4].

3. The next day, counsel for Luxco sent Applicant's counsel an e-mail and requested counsel's availability to undertake the required discovery conference. *See* Nov. 27, 2013, e-mail from A. Gilfoil to S. Halpern, a copy of which is attached hereto as Exhibit A. Applicant's counsel indicated in response that she would discuss the matter with her client and provide further response thereafter. *Id.*

4. Having received no further response, counsel for Luxco sent Applicant's counsel another e-mail on December 9, 2013 and again requested dates when counsel was available to undertake the mandatory discovery conference. *See* Dec. 9, 2013 e-mail, a copy of which is attached hereto as Ex. B. As noted therein, Luxco's counsel asked to schedule the discovery conference as soon as practical in light of the upcoming holidays. *Id.*

5. Applicant did not provide any response to the above-referenced December 9, 2013 communication.

6. In an effort to accomplish the discovery conference before the Board's deadline, upcoming holidays and anticipated travel schedule of counsel, on December 12, 2013 Luxco's counsel again sent Applicant's counsel another e-mail and provided further information regarding Luxco's positions relative to the topics addressed in the Board's October 21 Order. *See* December 12, 2013 email, a copy of which is attached hereto as Ex. C. Specifically, Luxco outlined its positions regarding settlement, scheduling, accelerated case resolution, deviation from the Board's rules relating to discovery and introduction of evidence, any stipulations and the Board's Protective Order. *Id.*

7. Applicant's counsel responded on December 12 to state that she disagreed that Luxco had effectively met and conferred, but noted that she was still waiting to hear from her client and, as such, was not in a position to discuss this matter. *See* Dec. 12, 2013, e-mail

correspondence from S. Halpern to A. Gilfoil, a copy of which is attached hereto as Ex. D. Applicant's counsel did not provide any further information regarding Applicant's positions on the topics outlined in Luxco's December 12 e-mail, nor did she provide Luxco with any settlement proposal regarding resolution of this matter. Rather, Applicant's counsel requested Luxco's availability for a conference on December 23, 24 or 27. *Id.* Applicant's counsel did not provide any explanation why she would be able to communicate with her client in advance of these dates when she had been otherwise unable to do so since November 27.

8. Luxco responded the same day, noting that, because of the holidays, counsel would not be available on Christmas Eve, December 24, nor December 27 for the discovery conference, but that counsel was available on December 23, "as well as most of the week of December 16." *See Id.*

9. By way of e-mail on December 13, Applicant's counsel again stated that she had been unable to "receive confirmation" from her client regarding the discovery conference and was thus unable to undertake same in the coming week. Therein, counsel requested Luxco's availability for a conference on December 30, 2013. *See* Dec. 13, 2013, e-mail from S. Halpern to A. Gilfoil, a copy of which is attached hereto as Ex. E.

10. The same day, and to Luxco's surprise, Applicant, without notice or otherwise relaying to Luxco that it perceived a need to involve the interlocutory attorney, filed its present request with the Board.

11. Therein Applicant suggests that Opposer's counsel can allegedly "only be available on December 23, 2013." *See* Request for Discovery Conference [Dkt. 5], at p. 1. Further, Applicant provides no reason or explanation why it perceives the need to involve the

Board in the discovery conference, nor does it suggest what specific issues warrant the Board's involvement here.

12. On December 14, 2013, Luxco's undersigned counsel responded to Applicant's Dec. 13 e-mail and indicated therein that counsel could make accommodations to be available on December 30, 2013 despite having existing holiday plans. *See* Dec. 14, 2013, e-mail from A. Gilfoil to S. Halpern, at Ex. E.

13. Applicable Board rules impose on Applicant a duty to cooperate in the discovery process. *See* TBMP §408.01; *Panda Travel, Inc. v. Resort Option Enterprises, Inc.*, 94 U.S.P.Q.2d 1789, 1791 (TTAB 2009)("[t]he Board expects parties to cooperate during discovery").

14. Similarly, "[a]ll parties to a proceeding have a duty to cooperate and conduct the discovery conference in a timely fashion." TBMP §408.01(a). This duty imposes on both parties equal responsibility "to ensure that a discovery conference takes place by the assigned deadline." *Guthy-Renker Corp. v. Boyd*, 88 U.S.P.Q.2d 1701, 1703 (TTAB) (finding that "Applicant has not demonstrated more than lackluster attempts at scheduling and conducting the required conference").

15. As noted above and detailed in the attached exhibits, any suggestion that Luxco can only available on December 23 is simply not true. Luxco has provided Applicant with numerous dates since November 27, the day after Applicant filed its answer in this proceeding, on which to conduct the discovery conference, and Applicant has simply dragged its feet throughout the entire process. Luxco has made adequate efforts to undertake the required discovery conference and any assertions to the contrary have no basis in fact.

16. Luxco does not perceive this to be an overly complex case or one raising issues necessitating the Board's involvement in the discovery conference. However, to the extent the Board wishes to participate in the discovery conference and has availability for same prior to the December 30 deadline, Luxco is available to undertake the same at an agreeable time for the Board on December 17, 18, 19, 20, 23 or 30. Regardless of whether the Board is able to participate in the discovery conference, Luxco would like Applicant's substantive response to the issues addressed in the Board's prior Order. Although Luxco provided its positions regarding these issues on December 12, Applicant has refused to respond or provide further substantive response regarding these topics.

WHEREFORE, for the foregoing reasons, to the extent the Board has any remaining availability to participate in a telephonic conference prior to the December 30 discovery conference deadline, Luxco requests that the same be scheduled as soon as practical. Luxco can be available to undertake the telephonic discovery conference at an agreeable time for the Board on either December 17, 18, 19, 20, 23 or 30. Alternatively, should the Board not have availability to participate because of the upcoming holidays and related travel, Luxco requests that the Board order Applicant's counsel to comply with its obligation to participate in the mandatory discovery conference as soon as practical without disturbing the schedule duly-imposed by the Board to guide this proceeding.

DATED: December 17, 2013.

LUXCO, INC.

By: /s/ Andrew R. Gilfoil
Michael R. Annis
Andrew R. Gilfoil
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63108
Telephone: (314) 480-1500
Facsimile: (314) 480-1505
mike.annis@huschblackwell.com
andy.gilfoil@huschblackwell.com
Attorneys for Luxco, Inc.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing was served by First Class Mail, postage prepaid on this 17th day of December, 2013, upon:

Stacey R. Halpern
Knobbe, Martens, Olson & Bear, LLP
2040 Main Street, 14th Floor
Irvine, CA 92614

/Andrew Gilfoil/

EXHIBIT A

Gilfoil, Andy

From: Stacey.Halpern <Stacey.Halpern@knobbe.com>
Sent: Wednesday, November 27, 2013 3:56 PM
To: Gilfoil, Andy
Cc: Annis, Michael; Nemes, Alan; Lori.Gillette
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

Andy,

Thank you for your email.

I am out of the office the rest of the week. As such, I will discuss the matter with my client on Monday and get back to you.

Stacey

Stacey Halpern
Partner
Stacey.Halpern@knobbe.com
949-721-6301 Direct
Knobbe Martens
INTELLECTUAL PROPERTY LAW
five decades. one focus.
2040 Main Street, 14th Floor
Irvine, CA 92614

From: Gilfoil, Andy [<mailto:Andy.Gilfoil@huschblackwell.com>]
Sent: Wednesday, November 27, 2013 9:50 AM
To: Stacey.Halpern
Cc: Annis, Michael; Nemes, Alan; Gilfoil, Andy
Subject: Luxco, Inc. v. Radillo, Opp. No. 91213097

Ms. Halpern,

I noticed that yesterday you filed an answer on behalf of the Applicant in the above-referenced trademark opposition proceeding. As you will recall, the Board previously set a deadline for us to undertake the initial discovery conference in this matter on or before December 30.

I would like to schedule the same as soon as practical, particularly since the end of December tends to get hectic. To this end, I am generally available the weeks of December 2 and 9, with the exception of being out of the office portions of the morning on December 10 and 11. At your earliest opportunity please advise whether any of these dates work.

Thank you in advance for your response.

Best,

Andy Gilfoil

Andrew R. Gilfoil
Attorney

HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105-3433
Direct: 314.480.1812
Fax: 314.480.1505
Andy.Gilfoil@huschblackwell.com
huschblackwell.com
[View Bio](#) | [View VCard](#)

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EXHIBIT B

Gilfoil, Andy

From: Gilfoil, Andy
Sent: Monday, December 09, 2013 8:41 AM
To: 'Stacey.Halpern'
Cc: Annis, Michael; Nemes, Alan; Lori.Gillette; Gilfoil, Andy
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

Ms. Halpern,

Just following up on your 11/27 email below as I have not heard further regarding a good time for the initial discovery conference. As mentioned, we would like to schedule as soon as practical in light of the upcoming holiday. Please advise at your earliest opportunity when you are available for same.

Thanks,

Andy

Andrew R. Gilfoil
Attorney
Direct: 314.480.1812
Andy.Gilfoil@huschblackwell.com

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Sent: Wednesday, November 27, 2013 3:56 PM
To: Gilfoil, Andy
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Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

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Thank you in advance for your response.

Best,

Andy Gilfoil

Andrew R. Gilfoil
Attorney

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Fax: 314.480.1505
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EXHIBIT C

Gilfoil, Andy

From: Gilfoil, Andy
Sent: Thursday, December 12, 2013 11:28 AM
To: 'Stacey.Halpern'
Cc: Annis, Michael; Nemes, Alan; 'Lori.Gillette'
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

Stacey,

Having not heard further from you regarding a time to meet and confer for our initial discovery conference I provide below Luxco's positions on the topics set forth in the Board's Order.

- With respect to potential settlement, Luxco's position is that the applied-for mark cannot exist on the register, and that any possible settlement would need to include abandonment of the subject application. If your client has a particular settlement proposal in mind I am happy to pass it along to the client.
- At this point we see no reason to deviate from the schedule set forth in the Board's Order of 10/21.
- Similarly, we see no need to deviate from the Board's rules relating to disclosures, discovery and introduction of evidence at trial.
- The Board's standard Protective Order is also agreeable to Luxco.
- We are not inclined to enter into any stipulations at this point, but if you have any particulars in mind we are happy to consider. The one stipulation I would add at this point is that we are fine with service of documents and papers by way of e-mail. Please advise if that is acceptable to your client.
- Finally, we do not believe this to be a case that is amenable to accelerated case resolution. If you feel differently please advise.

We view the forgoing as having satisfied Luxco's initial discovery conference meet and confer obligations, but if you feel differently please advise. I look forward to hearing from you further regarding Applicant's position on the above topics. Luxco's initial disclosures and discovery will be served in due course.

Thanks,

Andy

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Direct: 314.480.1812
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Cc: Annis, Michael; Nemes, Alan; Gilfoil, Andy
Subject: Luxco, Inc. v. Radillo, Opp. No. 91213097

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Thank you in advance for your response.

Best,

Andy Gilfoil

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EXHIBIT D

Gilfoil, Andy

From: Gilfoil, Andy
Sent: Thursday, December 12, 2013 11:46 AM
To: 'Stacey.Halpern'
Cc: Lori.Gillette; Annis, Michael; Nemes, Alan
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

I am generally available on December 23, as well as most of the week of December 16. I will be out of the office due to the holiday on December 24 and 27, which was part of the reason why I have attempted to schedule this conference early in the month of December.

Look forward to hearing from you further on your availability.

Andrew R. Gilfoil
Attorney
Direct: 314.480.1812
Andy.Gilfoil@huschblackwell.com

From: Stacey.Halpern [<mailto:Stacey.Halpern@knobbe.com>]
Sent: Thursday, December 12, 2013 11:42 AM
To: Gilfoil, Andy
Cc: Lori.Gillette
Subject: Luxco, Inc. v. Radillo, Opp. No. 91213097
Importance: High

RULE 408 – FOR SETTLEMENT PURPOSES ONLY

Andy,

I note that I am still waiting to hear from my client. As such, I am not yet in a position to discuss this matter with you. I also note that the deadline to conduct the settlement conference is not until December 30, 2013. Moreover, we do not agree that your email complies with the TTAB requirements to conduct the settlement conference. Accordingly, please provide me with a list of times you are available on December 23, 24 or 27, 2013.

Stacey

Stacey Halpern
Partner
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Andy Gilfoil

Andrew R. Gilfoil
Attorney

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Direct: 314.480.1812

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EXHIBIT E

Gilfoil, Andy

From: Gilfoil, Andy
Sent: Saturday, December 14, 2013 1:21 PM
To: 'Lisa.Helmle'
Cc: 'Stacey.Halpern'; 'grupo.004m.kmob@iwcs.kmob.com'; Annis, Michael; Nemes, Alan; Gilfoil, Andy
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

It is unfortunate that despite Luxco's regular attempts to schedule this conference as soon as practical you have been unable to confer with your client regarding this matter sufficiently to undertake same despite having many weeks to do so. I raised the issue of the issue of the Christmas holiday in late November, and yet since they you have been unable to provide any dates prior to December 23.

I had not planned to be back in the office on December 30, but will make accommodations to be available if that is the only date you can undertake this straight-forward and perfunctory conference. I again note that I have previously indicated many available dates earlier in December and general availability the week of December 16, as well as being available on Dec. 23. As a result, your representation to the Board that the undersigned has indicated that "he can only be available on December 23, 2013" is simply not accurate.

Andrew R. Gilfoil
Attorney
Direct: 314.480.1812
Andy.Gilfoil@huschblackwell.com

From: Lisa.Helmle [<mailto:Lisa.Helmle@knobbe.com>]
Sent: Friday, December 13, 2013 12:29 PM
To: Gilfoil, Andy
Cc: Stacey.Halpern; grupo.004m.kmob@iwcs.kmob.com
Subject: FW: Luxco, Inc. v. Radillo, Opp. No. 91213097

Andy,

Thank you for your email.

As I advised you I have not receive confirmation from my client regarding the settlement conference. Thus, I am unable to conduct the settlement conference next week.

Will you be back in the office on December 30, 2013?

Stacey Halpern
Partner
shalpern@knobbe.com
949-721-6301 Direct

Knobbe Martens

INTELLECTUAL PROPERTY LAW

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Subject: Luxco, Inc. v. Radillo, Opp. No. 91213097
Importance: High

RULE 408 – FOR SETTLEMENT PURPOSES ONLY

Andy,

I note that I am still waiting to hear from my client. As such, I am not yet in a position to discuss this matter with you. I also note that the deadline to conduct the settlement conference is not until December 30, 2013. Moreover, we do not agree that your email complies with the TTAB requirements to conduct the settlement conference. Accordingly, please provide me with a list of times you are available on December 23, 24 or 27, 2013.

Stacey

Stacey Halpern
Partner
Stacey.Halpern@knobbe.com
949-721-6301 Direct

Knobbe Martens
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five decades. one focus.
2040 Main Street, 14th Floor
Irvine, CA 92614

From: Gilfoil, Andy [<mailto:Andy.Gilfoil@huschblackwell.com>]
Sent: Thursday, December 12, 2013 9:28 AM
To: Stacey.Halpern
Cc: Annis, Michael; Nemes, Alan; Lori.Gillette
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

Stacey,

Having not heard further from you regarding a time to meet and confer for our initial discovery conference I provide below Luxco's positions on the topics set forth in the Board's Order.

- With respect to potential settlement, Luxco's position is that the applied-for mark cannot exist on the register, and that any possible settlement would need to include abandonment of the subject application. If your client has a particular settlement proposal in mind I am happy to pass it along to the client.

- At this point we see no reason to deviate from the schedule set forth in the Board's Order of 10/21.
- Similarly, we see no need to deviate from the Board's rules relating to disclosures, discovery and introduction of evidence at trial.
- The Board's standard Protective Order is also agreeable to Luxco.
- We are not inclined to enter into any stipulations at this point, but if you have any particulars in mind we are happy to consider. The one stipulation I would add at this point is that we are fine with service of documents and papers by way of e-mail. Please advise if that is acceptable to your client.
- Finally, we do not believe this to be a case that is amenable to accelerated case resolution. If you feel differently please advise.

We view the forgoing as having satisfied Luxco's initial discovery conference meet and confer obligations, but if you feel differently please advise. I look forward to hearing from you further regarding Applicant's position on the above topics. Luxco's initial disclosures and discovery will be served in due course.

Thanks,

Andy

Andrew R. Gilfoil
Attorney
 Direct: 314.480.1812
Andy.Gilfoil@huschblackwell.com

From: Gilfoil, Andy
Sent: Monday, December 09, 2013 8:41 AM
To: 'Stacey.Halpern'
Cc: Annis, Michael; Nemes, Alan; Lori.Gillette; Gilfoil, Andy
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

Ms. Halpern,

Just following up on your 11/27 email below as I have not heard further regarding a good time for the initial discovery conference. As mentioned, we would like to schedule as soon as practical in light of the upcoming holiday. Please advise at your earliest opportunity when you are available for same.

Thanks,

Andy

Andrew R. Gilfoil
Attorney
 Direct: 314.480.1812
Andy.Gilfoil@huschblackwell.com

From: Stacey.Halpern [<mailto:Stacey.Halpern@knobbe.com>]
Sent: Wednesday, November 27, 2013 3:56 PM
To: Gilfoil, Andy
Cc: Annis, Michael; Nemes, Alan; Lori.Gillette
Subject: RE: Luxco, Inc. v. Radillo, Opp. No. 91213097

Andy,

Thank you for your email.

I am out of the office the rest of the week. As such, I will discuss the matter with my client on Monday and get back to you.

Stacey

Stacey Halpern

Partner
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From: Gilfoil, Andy [<mailto:Andy.Gilfoil@huschblackwell.com>]

Sent: Wednesday, November 27, 2013 9:50 AM

To: Stacey.Halpern

Cc: Annis, Michael; Nemes, Alan; Gilfoil, Andy

Subject: Luxco, Inc. v. Radillo, Opp. No. 91213097

Ms. Halpern,

I noticed that yesterday you filed an answer on behalf of the Applicant in the above-referenced trademark opposition proceeding. As you will recall, the Board previously set a deadline for us to undertake the initial discovery conference in this matter on or before December 30.

I would like to schedule the same as soon as practical, particularly since the end of December tends to get hectic. To this end, I am generally available the weeks of December 2 and 9, with the exception of being out of the office portions of the morning on December 10 and 11. At your earliest opportunity please advise whether any of these dates work.

Thank you in advance for your response.

Best,

Andy Gilfoil

Andrew R. Gilfoil
Attorney

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